WHY RELIGIOUS LIBERTY IS A SPECIAL, IMPORTANT AND LIMITED RIGHT

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I

What is religious liberty? As with all "What is?" questions about human matters,[1] an adequate answer must depend (as Aristotle advises) on first answering the question "Why value religious liberty?" Of course, the latter question presupposes some beliefs, indeed shared beliefs, about the meaning of the words "religion" and "liberty." For this and other reasons, it is reasonable to follow some other advice and practice of Aristotle and begin with common sayings. The relevant common sayings are the public declarations and constitutional provisions which articulate a right to religious liberty or, in the American Constitution's First Amendment phrase, taken over in the first paragraph of the Second Vatican Council's Declaration on Religious Freedom (1965), "the free exercise of religion".

A representative example of these public declarations and constitutional provisions is art 25 of the Constitution of the Republic of India, brought into effect in January 1950 after more than two years of lucid and intelligent public debate in a constitutional convention:

> *Right to Freedom of Religion*
> **25.** (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
> (*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
> (*b*) providing for social welfare and reform or the

[1] See Finnis, "Law & What I Truly Should Decide," The American Journal of Jurisprudence 48 (2003) 107-29 at 107-8.

> throwing open of Hindu religious institutions of a
> public character to all classes and sections of Hindus

Later in the same year, the European Convention on Fundamental Rights and Freedoms articulated:

> Article 9 – Freedom of thought, conscience and religion
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Common to all these formulations, including the American First Amendment, is the term "free[dom]". Now, these declarations of constitutional, legal rights all, in their context, assert that what they declare and establish as legal and constitutional was already, beforehand, and foundationally, a moral right of essentially the same extent. So the question arises whether these declarations teach that there is a moral, that is a natural, right to profess whatever religion or religions one chooses. Or again, is the liberty or freedom which is being asserted a moral freedom from all obligations, for instance all vows, in matters of religion, as French revolutionary tradition proclaimed (and insisted upon by dissolving all religious orders)? It was this kind of understanding of religious liberty that led the mid-nineteenth century popes to denounce claims to religious liberty as madness. And the answer given by the Second Vatican Council in 1965, in its Declaration *Dignitatis Humanae*, is that the right to religious freedom is a right to be *free from coercion* when one is exercising one's conscience in forming, holding or giving effect in action to one's beliefs "in matters religious" (*in re religiosa*). This freedom from coercion was often described by the drafting committee as an immunity. And though it is not an immunity in the sense stipulated by Hohfeld in his analysis of jural relations, there is no objection to using "immunity" as a synonym for a claim-right not to be interfered with or coerced. The "religious liberty" is nothing more, nor less, than a

claim-right not to be coerced in performing religious acts, individual or corporate within due limits.

It follows that the fundamental topic of *Dignitatis Humanae* is in substance not a liberty-right (*stricto sensu*) but duty – the duty of state government and law, and of other groups and individuals in civil society, not to coerce anyone's religious acts unless they threaten the rights of others, public peace, or public morality. The right of religious liberty – freedom from coercion – that is the subject-matter of *DH* is nothing other the correlative of that duty, i.e. it is *nothing other than that duty considered from the point of view of the beneficiary* of (the performance of) that duty.

If we now ask *why* there is this duty to respect, that is, to leave uncoerced, the conscientious religious beliefs and acts of everyone, even beliefs that are false and acts that are accordingly ill-justified, the Second Vatican Council gives more than one answer, but most prominently and fundamentally points to another duty. This is one's serious duty – the duty of each and every person -- to seek truth, particularly truth *in re religiosa* – obviously we will have to come back to try to give content to this vague phrase – and, having raised and pursued these questions, to shape one's life in line with what one judges one has discovered about such matters, a duty which is only fulfilled if it is pursued with an authenticity that would be prejudiced, corrupted and even nullified by coercion and "psychological pressure."

II

To understand all this a bit better, and move a little closer to understanding what it is about religion – the *res religiosa* – that calls for respect, let's look at the arguments of contemporary American legal and constitutional theorists who hold that there is nothing about religion or religious liberty that calls for particular respect, or any mention in constitutional bills of rights. Religion has no such dignity, though it or its adherents may (some of these theorists grant) have a historical vulnerability, especially to each other, that explains and in a weak sense justifies the mention of religion in the first limb of the First Amendment. A principal proponent of such a theory is Ronald Dworkin.[2] But here in Princeton it is doubly fitting to take as representative the work, over nearly fifteen

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years, of Christopher Eisgruber and Lawrence Sager, culminating in their book *Religious Freedom & the Constitution* (Harvard UP, 2007). It argues for a principle they call "Equal Liberty," a principle that, as they put it, "denies that religion is a … category of human experience that demands special benefits and/or necessitates special restrictions,"[3] or any "special immunity for religiously motivated conduct."[4]

In Eisgruber and Sager's theory or principle of the "Equal Liberty" demanded by fairness in a religiously diverse society, there is much that may seem welcome. They argue strenuously against the metaphor of "separation of Church and State," and their theory equally discredits not only the slogan but also the once prevailing Supreme Court interpretation of "no establishment of religion" that forbad any state aid to religious or religiously affiliated enterprises. They offer to defend, not a secularism that would reject, exclude or disparage religion, but the healthy secularity of non-religious institutions which decline to be -- and are prohibited from being – "overtly or specifically religious."[5] They have no time for Rawlsian proposals to expel from the public domain all religious arguments or grounds for decision-making.[6] As to free exercise of religion, Eisgruber and Sager support the approach in *Employment Division v. Smith*,[7] upholding "neutral and generally applicable" laws even when they happen to restrict some religious practices and no "compelling state interest" required the law to do so. That approach is much less welcome to many who recognize the particular good of religion and religious liberty, but I shall not be arguing against it here. Instead, I shall say why I think the theory of Equal Liberty proposed by Eisgruber and Sager is radically unsound, at the very least insofar as it denies to religion and religious liberty any moral or constitutional status distinct from other "deep commitments."

Eisgruber and Sager's first exposition of their theory was entitled "The Vulnerability of Consciences: The Constitutional Basis for Protecting Religious Conduct"[8]. But the title can give a mistaken impression of their central thesis. For they *deny* that conscience as the rational faculty of practical judgment has any more claim than

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3 *Religious Freedom & the Constitution*, 6.

4 Ibid., 13.

5 Ibid., 313.

6 See ibid., 48-50 (not explicitly mentioning Rawls's "political liberalism")

7 494 US 872, 890 (1990), Scalia J for the Court.

8 University of Chicago Law Review 61 (1994) 1245-1315.

religion to constitutional privilege or even protection.[9] Rather, the proper object of constitutional protection is any "deep concern", any and all "deeply" motivated and self-shaping attitudes and behavior. Whether or not these are religious *or even conscientious*, all alike are entitled to "equal regard". There is, they say, a "grand diversity of relationships, affiliations, activities, and passions that share a constitutional presumption of legitimacy" because in them members of "a modern, pluralistic society…find their identities, shape their values, and live the most valuable moments of their lives".[10] Religious acts, they concede, have the same dignity and constitutional status as the "relationships, affiliations, activities and passions" under discussion … Eisgruber and Sager's article did not say how far this wider category extends, and their book, too, is not much concerned to clarify the matter. But it does make clear that, in their view, the freedom of a religious association such as the Catholic Church to maintain a male priesthood is defensible only as an instance of the constitutional principle that "there are a variety of personal relationships in which members of our political community are free to choose their partners [as in *Lawrence v Texas*], associates or colleagues without interference from the state."[11] And their 1994 article had several times explicated the phrase "deep concern(s)" (which in the book is usually rendered "deep commitment(s)") as including "passionate" acts and relationships.[12]

Eisgruber and Sager are right. If religion is, as they think, just one among the deep passions and commitments that move people, it does not deserve constitutional mention on account of any special dignity or value, and if its mention in constitutions is defensible at all, the defense must be back-handed: religious people have been so beastly to each other that historical constitution-makers have not necessarily been unreasonable in treating the religious as specially vulnerable to discrimination. But the hypothesis – that religion is just one deep and passionate commitment amongst others – is, of course, lethal to religion. It is an absolutely external view, which treats religious propositions as

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9 Ibid., 1263, 1268-70]

10 Eisgruber & Sager, "The Vulnerability of Consciences: The Constitutional Basis for Protecting Religious Conduct" U. Chi. L. Rev. 61 (1994) at 1266.

11 *Religious Freedom & the Constitution*, 65; *Lawrence v Texas*, involving partnership in casual homosexual sodomy, is cited on the preceding page.

12 U. Ch. L. Rev. 61 (1994) at ++. At the very outset (1245n), the authors say that "an important theme of this essay is that religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."

if they were inherently incapable of conveying any understanding of or rational response to any feature of reality.[13] They treat religion in the way that Ronald Dworkin regularly treats views of legislators or "majorities" with which he is unsympathetic, that is, not as propositions *about* rights, or common good, or as any other proposition or premise justifying a normative conclusion, but instead as mere expressions of distaste or disapproval, accompanied by an appeal to the power of those who hold these views – their power as a majority to give effect to their attitude, their passionate commitment.[14] Eisgruber and Sager fall into this Dworkinian sort of sophism on the last pages of their book, when they twice reduce the concerns of religiously minded people that America acknowledge its dependence on God to a mere concern for "their [own] wellbeing," a mere complaint that "*they* are being deprived of an environment" that they value.[15] The externality of Eisgruber and Sager's view of religion – that is, their refusal to enter into the line of rational inquiry, reflection and judgment that leads people to affirm the existence of a transcendent intelligent and provident creator – is witnessed by their repeated remarks about "intelligent design," when they go beyond the rational (albeit not wholly compelling) objection that gaps in experimental science call for more experimental science to the further claim that the "suggestion" that there exists an intelligent designer is merely "a vague kind of religious view," that is that "it is a hypothesis grounded in religion," and that identifying God as designer, rather than gods, wizards, fairies, or "transcendental pasta," is a mere profession of religious faith.[16] The truth, of course, is that, whatever may be the case with particular theories of evolution, the general hypothesis of intelligent design of the whole cosmos, including all the scientifically verifiable mechanisms of evolution, is one of the rational *grounds*, not a mere sub-rational consequence, of religious faith.

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13 In *Religious Freedom & the Constitution* at 103, they explicitly speak from, or on behalf of, "an external, secular perspective."

14 I first pointed to this sophistic technique of Dworkin in "A Bill of Rights for Britain?" Proceedings of the British Academy 52 (1986) 303-331 at 309-311, and again, with reference to its pernicious echoes in recent Supreme Court doctrine, in "Universality, Personal and Social Identity, and Law," (Third) Congresso Sul-Americano de Filosofia do Direito and (Sixth) Colóquio Sul-Americano de Realismo Jurídico, Porto Alegre, Brazil, 4 Oct 2007. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094277.

15 *Religious Freedom & the Constitution*, 284-5.

16 Ibid., 190, 281, 310 at n. 56.

Now suppose that Eisgruber and Sager had followed the drafts (but not the final version) of the First Amendment, and the Indian Constitution and the European Convention on Human Rights, and had associated religious liberty with freedom of conscience. Would that have provided them, or us, with a ground for according religion, or conscience and religion together, a particular constitutional status, as worthy of special mention in enumerating fundamental rights?

You might think so. After all, the Council's Declaration on Religious Liberty defines religious liberty in close conjunction with conscience, a conjunction eliminated by the truly disgraceful English mistranslation of sec. 2 on the Vatican website: the Latin reads:

> This Vatican Council declares that human persons have the right to religious freedom. This kind of freedom consists in this: that all human beings ought to be immune from coercion whether by individuals or social groups and by every kind of human power, so that in religious matters no-one is compelled to act against his or her conscience or impeded from acting according to his or her conscience, whether acting publicly or privately, alone or in association with others, within due limits.[17]

But it would have been no improvement if Eisgruber and Sager had treated conscience, or if the reader of the Council treats conscience, in the way that Robert Bolt, to almost universal applause, treats conscience in his play about St Thomas More, *A Man for All Seasons*. For there he makes More say: "But what matters to me is not whether it's true or not but that I believe it to be true, or rather, not that I *believe* it, but that *I* believe it."[18] In Bolt's conception, what matters about fidelity to conscience is that it is fidelity to oneself, to one's inmost core, one's authenticity. To Aquinas, More and the authors of

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[17] DH 2: "Haec Vaticana Synodus declarat personam humanam ius habere ad libertatem religiosam. Huiusmodi libertas in eo consistit, quod omnes homines debent immunes esse a coercitione ex parte sive singulorum sive coetuum socialium et cuiusvis potestatis humanae, et ita quidem ut in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam neque impediatur, quominus iuxta suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, intra debitos limites." The astoundingly inadequate translation reads: "This Vatican Council declares that the human person has a right to religious freedom. This freedom means that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits."

[18] *A Man for All Seasons* (Vintage Books, 1990), 91.

Dignitatis Humanae, what matters about one's judgments of conscience is that one considers them to be *true*, so that failure to act in line with those judgments, while one holds them, is infidelity to *truth*.[19] An observer then and there, or I myself later, may be able to see that my judgments are not true, but mistaken. But that is scarcely relevant at all. For in making judgment that p – that is, in asserting my belief that p --I am doing nothing other than assert that p is true. So if p bears on my actions – on what I ought or ought not to do – and I fail to act accordingly, I act against the *truth* and against morality. That it is only the truth as I see it, and morality as I see it, and that I may have been mistaken in judging it true and morally required, are neither here nor there in relation to the question whether I was loyal or disloyal to truth and morality. Those who think that loyalty to oneself, or to one's self, is what is at stake in acting conscientiously and refusing to act against conscience are unable, so far as I can see, to make sense of repentance. Bolt is one of these; he has everything exactly backwards, and his misunderstanding, being a denial or sophistical mishandling of the transparency of judgments for truth, is practically identical to Dworkin's and Eisgruber and Sager's sophistical premise that a group whose views they disfavor is concerned not with truth or true human welfare but with enforcing, maintaining or dissemination the views it happens to have -- with the result that they need not engage with that group's reasons for holding those views, nor with reasons that might in any case support those views. Bolt's misunderstanding of conscience is forerunner or progeny of the worldview that makes autonomous *commitment* what matters, even if the commitment be passionate in the sense of "passions" in which they may well be *over and against* reason and in need of subjection to reason's properly constitutional mastery and rule.

Concern for conscience, then, is worthy of respect only because, even when it happens to be mistaken, it is concern for truth. Concern for religious conscience is warranted only because, or on the assumption, that there can be *true* judgments about religious matters. And one of the most important truths about religious matters is that divine creativity and intelligence is at the source of every truth there is, and above all of

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[19] Thus, too, John Paul II, Encyclical *Veritatis Splendor* (1993): "63. In any event, it is always from the truth that the dignity of conscience derives. In the case of the correct conscience, it is a question of the *objective truth* received by man; in the case of the erroneous conscience, it is a question of what man, mistakenly, *subjectively* considers to be true."

our ability to make judgments that at least sometimes are true and thus at least sometimes link us, in ways otherwise simply unavailable, with realities past and present, and with real opportunities of our truly flourishing, individually and all together. Religion's supreme relevance – or at least, an integral element in religion's relevance – to human life and wellbeing is that it articulates, more or less adequately, the truth about truth (and thus about conscience and everything else). The truth about truth that it articulates is the truth that everything we experience and envisage is utterly dependent upon the originating and sustaining intelligence and will of a Creator whose existence, intelligence and freedom provide the explanation that our inquiring reason imperiously (because by force of reasons) demands only if understood to be utterly free from the contingency – the falling short of pure actuality unmixed with mere potentiality – that marks the nature of everything known to experience and natural science, and marks too the imagined natures of polytheistic gods, or wizards, or fairies, or transcendental pasta.[20]

Inquiring reason outruns the methods of natural science, but not its own capacities and integrity, when we affirm – not merely as a product or consequence of faith, but in the first instance as a reasonable preamble to faith – that the success of everything we attempt is dependent upon the cooperation, the co-working, of God. Natural reason, apart from any faith in any divine revelation, endorses the full reasonableness and the importance of the prayer (the Regents' prayer) expelled from the public schools of New York by the Supreme Court in *Engel v Vitale* (1962): "Almighty God we acknowledge

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[20] Finnis, *Aquinas* (1998), 306: "Polytheisms, idolatries, and gnosticisms propose a multiplicity of more or less creative and providential divinities, all falling short of God's simplicity of actuality, and reflecting rather the profusion of natures in the universe of experience. Pantheism proposes that the universe itself, precisely as informed by intelligibility and thus by mind, is divine. Though not as foolish, in principle, as atheism, polytheism and pantheism alike are philosophically arbitrary and misguided. They presuppose a semi-materialist under-estimation of intellect's capacity to grasp (and project) multiple and changing realities (actual or possible) in a single act of mind. They veer towards the pernicious in the character they ascribe to a divinity or divinities falling short of the perfection of a pure and limitless act(uality), and imaging moral weaknesses of the people who project them. They are utterly inconsistent with a logically necessary implication of the arguments which justify affirming divine existence: that existence (pure act) is what divine being is. For, that being so, whatever we understand of something which can be or not be cannot be true of God, and the supposed divine principles posited by polytheism or pantheism, being intelligible to us, cannot be God. Pantheism and polytheism are rationally ineligible because they stray from only way in which anything can be rationally affirmed of the divine: the way which Aquinas calls *remotio*—connoting both the utter separateness or transcendence (removed-ness) of God and the fact that affirmations about God can be made only by negating (removing) creaturely imperfections." [footnotes omitted]

our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

Such is the core of natural religion,[21] and of any paradigmatic *res religiosa* even one as richly elaborated by revealed doctrine and worship as, say, Orthodox or Catholic Christianity. There can be non-paradigmatic, more or less watered-down instances of religion, some of them historically highly significant such as Buddhism. The human good of religion is centrally the good of being aligned in one's intelligence, will and freedom with the intelligence, will and freedom of the Creator; fall, repentance, forgiveness, redemption all fall within the ambit of that generic *alignment*, that *assimilatio* and *adhaesio*, as St Thomas puts it. One does not get the measure of religion's dignity and value if one remains with the conception of religion's value that Andrew Koppelman has proposed on the basis, not least, of the "place-holder" sketch of a good of religion that I offered in chapter IV of *Natural Law and Natural Rights*.[22] Koppelman's intentions in this enterprise are good – he is a critic of Eisgruber and Sager's unadmitted secularism -- but the criterion of success in identifying the content and dignity of the good of religion cannot be identified (as he attempts to identify them) without regard to the arguments that point to the existence of God and to something of the divine nature and activity.

Nor should we neglect the importance of natural religion's underpinning of the idea, the truth, of human equality, the equality of animals who, unlike (as far as we can tell) all other animals, have, each and all, the *radical* capacities of persons. Those capacities are to participate in the immaterial life of the spirit, the life of meanings, loigic, truths and errors (known by their consistency with evidence, not by their correlation with any brain-state), about the past and the possible. As art. 25(2)(b)[23] of the Indian

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21 On the importance of natural religion, and the idea of natural religion, in the thought of the founders of the American republic, see Gerard V. Bradley, *Religious Liberty in the American Republic* (Washington DC: Heritage Foundation, 2008), 8-9, 29, 40-41, 46 and 1-46 *passim.* The report of the US Senate Committee on the Judiciary on petitions to abolish the office of chaplain, 21 January 1853, lucidly affirms that "our fathers…did not intend to send our armies and navies forth to do battle for the country without any national recognition of that God on whom success or failure depends…"

22 See Andrew Koppelman, "Secular Purpose," Virginia L. Rev. 88 (2002) 87 at 130-31; "Is it Fair to Give Religion Special Treatment?" U. Ill. L. Rev. (2006) 571-603 at 593-4.

23 "[The state may make law] providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Constitution reminds us, it is possible for a developed religion to distort natural religion's awareness of human equality under the supreme, creative spiritual reality. But the greater threat to human equality is materialist, scientistic denials of spirit, denials which srip away the one aspect of human reality that makes us equals in dignity despite the manifold inequalities between us. It is entirely significant that those who expend the patrimony of a religious, anti-materialist civilization, the patrimony we call *rights*, by extending rights to sub-personal animals, are characteristically to be found denying the equal rights of young or disabled human persons. Prayer like the New York Regents' prayer, acknowledging to God our dependence and addressing to the unseen God a petition, both presupposes and reinforces the anti-materialist truth so essential to human rights and their acknowledgement.

III

Eisgruber and Sager admit that the rule in *Engel v Vitale*, expelling all such prayer from public schools even when opting-out of the prayer is fully permitted and protected, cannot be adequately justified by simple appeal to the risk of coercion by social pressure. Certainly, they concede, *Engel*'s progeny such as *Santa Fe Independent School District* (2000) could not be so justified: after all, anyone can stay away from a football game at which there will be school-sponsored prayer. But they vigorously defend the absoluteness of the rule in these cases by a wide-ranging principle of *disparagement*:

> Government-sponsored prayer rituals involve a public embrace of the faithful…more precisely, of those whose faiths are consistent with mainstream public prayer. As a result, their social meaning includes this blunt message: *The real members of this community (the school community and by extension the larger community serviced by the school or school district) are practicing Christians of a certain sort; others dwell among us but lack the status of full membership*. The public rituals create a class of outsiders and thereby **disparage** those relegated to that status. …Proponents…will no doubt object that neither they nor school authorities have any intention to disparage anybody; their goal is simply to make prayer rituals available to those who will appreciate them….[But] the relevant question is not about the intentions of particular speakers, nor about

> the perceptions of particular audiences, but rather about the social meanings of rituals, practices, and religions.[24]

You are entitled to be puzzled by a "meaning" which floats free both of the intentions of the speaker or acting person and of the perceptions of the audience. But this argument from unintended but supposedly real disparagement is now a mighty force in constitutional and political arguments against not only our religion or religions but also against the institution of marriage, the primacy of our language within our own country, and every other aspect of our culture which is not universally shared and about which some, whether or not part of our community by birth, are discontented. To require immigrants to speak our language, argues Joseph Raz, is to disrespect them, to express a judgment that their culture is inferior and to be eliminated.[25] Here Raz, for so many years a stern critic of Ronald Dworkin, implicitly throws in his lot with Dworkin's long-running sequence of arguments, each one springing up when its predecessor twin or cousin was refuted, all revolving around the claim that some state action manifests disrespect, or lack of equal respect, for those persons whose conduct it restricts or otherwise affects –- restricts or affects perhaps, in truth, out of lively concern to protect them from their own folly or weakness).

To all these attributions of disrespect, insult, disparagement, unhinged from any intent, we should reply that they are gratuitous and groundless, essentially sophistic fictions. The meaning of the resolve to pray together is simply *not* that those who abstain or absent themselves are not full members of the community. They are full members of the community, with every single right that everyone else in it enjoys, and every single right enjoyed by those who engage in the corporate activity from which they are entitled to dissent, and with whom they have, *pace* Eisgruber and Sager, equal constitutional stature.[26] Similarly, those countries or legislatures or citizens who insist that immigrants learn the country's language lest a Balkanised country be bad for all alike need neither have nor convey any view that the immigrant culture is inferior, or any intent to eliminate

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24 *Religious Freedom & the Constitution*, 163-4.

25 Joseph Raz, "Multiculturalism" Ratio Juris 11 (1998) 193-205 at 200, referring also to Raz, *Ethics in the Public Domain* (Oxford University Press, 2nd ed. 1995), 178. On all this see my "Universality, Personal and Social Identity, and Law," supra n. 14, part III.

26 Cf. *Religious Freedom & the Constitution*, 130, where the authors gratuitously postulate that a (hypothetical?) "mainstream Christian " majority consciously treat dissenters as "less than full members of our community" who lack "equal constitutional stature."

it. And in those cases where they do judge it inferior, and hope or even plan for its elimination, their judgment need be no more unfairly disrespectful of persons than the judgment that sexual relations between grown men and ten-year old girls are immoral, harmful and, however revered the heroes or prophets who have indulged in them, are to be eliminated from our community.

IV

I have just touched on one of the morally necessary limits to the right of religious freedom. That the right is limited was stated upfront in the Indian Constitution's statement of the right, and was made plain in the provisos or riders or qualifying clauses of the European Convention and in *Dignitatis Humanae*. The terms of these last two documents are very close to each other: "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others;" (ECHR art. 9(2)); "the need for an effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when people live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality." (*DH* sec. 7)

There can be problems about the boundaries of these exceptions; many of them are explored in the American cases on free exercise of religion. There can also be problems that are not really about boundaries but about abuses, moral errors by legislators or judges that can scarcely be protected against by sound constitutional provisions. The application of general and (in intent) religiously neutral laws against discrimination can be unjust and a grave imposition on religious or religiously organized and inspired enterprises. Such is the case with laws prohibiting discrimination against persons who make no secret of their engaging in same-sex sex acts but wish to be employed as teachers in Catholic or Evangelical schools or to make use of Catholic or Evangelical facilities such as adoption agencies, church halls, and so forth. The mentality which regards same-sex marriage as conceivable, let alone desirable or reasonable, involves a break with human experience and reason as radical as anything that has ever

been proposed to a mature polity, and the consequent unjust impositions on right-thinking religious or religiously motivated activities and associations are probably best resisted by protesting not so much that they are impositions on religious liberty but, rather, that they are impositions on associational freedom and perhaps the rights of parents, and in any case that they are, in many ways, profoundly wrong-headed about both sex and marriage, gross abuses of children's innocence, and reckless about the future of the country's common good.

I want to conclude, however, with a different line of thought about the necessary and appropriate limits on the right to religious freedom, and on just and lawful accommodations (as our constitutional lawyers say) of or to religion in the interests of the great human good that it more or less appropriately cultivates, participates in and makes available to others. Suppose a religion rejects on principle the right to religious freedom as defined, for example, in the ECHR's reference to freedom to change one's religion, and rejects also other fundamental elements of our constitutional order. This is not a daydream. It's only a little over five years since the eighteen judges of the European Court of Human Rights held unanimously, in *Refah Partisi (No.2) v Turkey*, that:

> …the Court considers that sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable*. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it…. a regime based on sharia … clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. .[A] political party whose actions seem to be aimed at introducing sharia … can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.[27]

On that basis the ECtHR upheld the Turkish Supreme Court's dissolution of Turkey's elected Government and of the country's main party, on the grounds that the Government

[27] *Refah Partisi (No. 2) v. Turkey* 37 European Human Rights Reports 1 (2003) at sec. 123 (emphasis added), Grand Chamber, upholding and adopting the language of the Third Section of the ECtHR in *Refah Partisi (No. 1) v Turkey* 35 European Human Rights Reports 3 (2002).

in which that party was dominant was preparing – or might well be preparing, and there is no obligation to wait until the last moment to be sure of such intentions -- to introduce sharia – the religious law of Islam -- either as law applicable to all or as part of a scheme in which all citizens would be subjected to the law of their respective religion.

If it is hard for *contemporary* American constitutionalists to take this sort of "militant democracy" – pre-emptive defence of democracy – at all seriously, it is even harder to get them to do so when it involves steadily focusing on the possibility that a particular religion – the private faith of fellow citizens or of hard-up immigrants -- might be different from all other religions in its core beliefs about the Constitution, and about the legitimacy of long-term deception and intimidation in the cause of overthrowing it or, much more immediately, in the cause of rendering certain constitutional guarantees inapplicable within the religion's zone of dominance. For I should not conceal the fact that it was part of Turkey's case before the ECtHR that "In order to attain its ultimate goal of replacing the existing legal order with sharia, political Islam use[s] the method known as "*takiyye*", which consist[s] in hiding its beliefs until it ha[s] attained that goal." The Court did not make any explicit finding about Islamic *takiyye* (a practice which had not, it seems, been denied by the applicant members of the dissolved government and party), but it did observe more broadly that political parties and movements may conceal their aims and profess their adherence to democracy and the rule of law until it is too late to prevent them overthrowing both.[28] Still, for present purposes we do not really need to speculate about the possible secret intentions of particular members of the Islamic religion. We can study the open public documents and declarations of states holding themselves out as Islamic, such as the Cairo Declaration on Human Rights in Islam, adopted by the governments of 45 states in August 1990.[29]. Purporting to track the Universal Declaration of Human Rights, this 1990 Declaration's article on religious freedom reads as follows: "(10) Islam is the religion of true unspoiled nature. It is prohibited to

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28 *Refeh (No. 1)* at secs. 48 and 80; *Refah (No.2)* at sec. 101.

29 U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993)

exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism." That's all. But articles 24 and 25 add, for good measure: "(24) All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah. (25) The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration."

These realities put a question-mark over more than one part of the orthodoxy of American freedom of religion doctrine. They raise a doubt about the part that says the law and the Court must make no investigation of a religion's doctrines, and over the part, treated as axiomatic by justices of every shade of opinion, that forbids any discrimination between religions. What if the "theological propositions of a religion" **include** *political* teachings "wholly at odds with premises of our liberal democracy" or, to speak like the ECtHR, "with the democratic ideal that underlies the whole of the [Constitution]" or, to speak I think more suitably, with the Constitution and other principles that we have taken as foundational for our law? Is it unconstitutional to discriminate between religions at the borders? Does doing so wrongly *disparage* adherents of the religion who are citizens already resident? Does it coerce *their* liberty *in re religiosa*? Or the human right to religious liberty of those who would be kept out of our community in the interests of our community's public order?

In relation to the last question, it is essential to make a distinction which recalls the second fundamental ground for religious liberty identified in *Dignitatis Humanae*, the argument from the division of jurisdiction implicit in "Render to Caesar the things that are Caesar's, and to God the things that are God's" – the argument, that is, from the fundamental distinction between Church and State. "The religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs. Government therefore ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare. However, it would clearly transgress the limits set to its power, were it to presume to

command or inhibit acts that are religious [*actus religiosos dirigere vel impedire*]." (DH 3) The distinction reappears in one of the present Pope's first statements:

> "Single believers are called to open their arms and their hearts to every person, from whatever nation they come, allowing the Authorities responsible for public life to enforce the relevant laws held to be appropriate for a healthy co-existence."[30]

One might add this about the distinction between Church and State. Within a universal religious community such as the Church, there is no distinction between male and female, slave and free, citizen and foreigner… It does not follow that all such distinctions are irrelevant to the common good and indeed the public order of political communities.

Because numbers – critical masses – matter, times change. A legislature looking forward from now, or fairly soon, might responsibly decide that the only likely medium-term constructive alternative to forbidding immigration by persons unwilling to renounce their religion's core theologico-political and numbers-dependent drive to impose political and legal domination will foreseeably prove to be the *state-promoted* introduction – as is beginning to be ventured in France, Germany and the UK – of an emasculated version of that religion, supervised by state instrumentalities responsible for selecting the teachers and preachers of that highly distinctive religion in the hope of watering down its inbuilt focus on domination, violence and submission, its division of the world into the world of submission and the world of war, its public and private subjection of women, and other features that (so the legislature might judge) make it at best inassimilable and at worst a clear and mounting danger to the public good. If the latter alternative (a State-sponsored form of that religion) is to be judged permanently unavailable here, because a plain "establishment of religion," still the resort to it by centrist European governments may go some way towards showing a compelling state interest in not leaving this religion and its followers to their own devices, and thus surmounting the bar raised by the beguiling but

[30] Benedict XVI, Address to the Pontifical Council for Pastoral Care of Migrants and Itinerant People, 15 May 2006: http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/may/documents/hf_ben-xvi_spe_20060515_pc-migrants_en.html

curious doctrine of the Supreme Court that discrimination against one religion is not only unfair but also an establishment of all the others (and of irreligion?).

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